



STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
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July 2, 2010

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

217385


Re: Docket NO. FD 35348
CSX Transportation, Inc. and Delaware &
Hudson Railway Company, Inc. – Joint Use
Agreement

Dear Ms. Brown:

The New York State Department of Transportation hereby files its Comments in the above-referenced proceeding.

I hereby certify that, on July 2, 2010, copies of these Comments have been served by First Class Mail, postage pre-paid, on the individuals listed at the end of this letter.

Sincerely yours,


ROBERT A. RYBAK
Division of Legal Affairs

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June 2, 2010
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35348

CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY COMPANY, INC.

JOINT USE AGREEMENT

**COMMENTS
OF
NEW YORK STATE DEPARTMENT OF TRANSPORTATION**

The State of New York, acting by and through its Department of Transportation ("NYSDOT"), in accordance with the procedural schedule established by the Board, hereby submits these Comments in response to the Application filed with the Board on April 27, 2010, by CSX Transportation, Inc. ("CSXT"), and Delaware and Hudson Railway Company, Inc. ("D&H") (collectively the "Applicants"). Through the Application, CSXT and D&H seek Board approval under 49 U.S.C. §§ 11321 – 26 for CSXT and D&H to commence operations pursuant to an agreement between CSXT and D&H, known as the New York Joint Use Agreement ("Joint Use Agreement.")

Pursuant to 49 CFR 1104.4(a), certification of this document is made by Robert A. Rybak, an attorney in NYSDOT's Division of Legal Affairs.

BACKGROUND

The proposed transaction involves the joint use of certain rail lines owned or operated by CSXT or D&H, located between Rouses Point Junction, N.Y., and Fresh Pond Junction, N.Y., consisting of 3 segments: the Saratoga Springs – Rouses Point Segment, the Albany – Saratoga

Springs Segment and the Albany – Fresh Pond Segment (collectively, “Joint Use Lines”). While not included in the Joint Use Lines, the Joint Use Agreement will affect train volumes and service on CSXT’s Selkirk and Mohawk Subdivisions between Albany, N.Y., and Syracuse, N.Y. (Albany – Syracuse Segment) and CSXT’s St. Lawrence and Montreal Subdivisions between Syracuse, N.Y. and the Canadian border at Fort Covington, N.Y. (Syracuse – Fort Covington Segment).

The New York State Department of Transportation is the executive department charged with responsibility for the supervision and administration of state policies and interests with respect to transportation within or affecting New York, including rail transportation. In addition, the New York State Department of Transportation is a non-carrier owner of a portion of the Albany – Fresh Pond Segment between Milepost 7 in the vicinity of High Bridge, N.Y., through and including Harlem River Yard, and CSXT’s Oak Point Yard, operated by CSXT¹.

In NYSDOT’s view, the proposed transaction raises a different set of issues within each distinct segment of the lines included in, or affected by, the Joint Use Agreement, some positive, some negative. These issues, grouped by segment, are as follows:

Albany – Fresh Pond Segment

The D&H currently accesses the New York City metropolitan area via trackage rights over CSXT’s “East of Hudson” rail line. The D&H obtained those rights in connection with the acquisition of Conrail by CSXT and Norfolk Southern Railway at the behest of NYSDOT (and the New York City Economic Development Corporation). *See CSX Corp. et al. – Control – Conrail Inc., et al., 3 S.T.B. 196, 282-283 (1998) (“Conrail”).*

NYSDOT remains fully committed to competitive, two-carrier service in the East-of-Hudson rail market as established in *Conrail*. The applicants to this proceeding claim that

¹ See *Consolidated Rail Corporation – Operation Exemption – A Line of the State of New York*, FD 33673, served October 23, 1998.

approval of the Joint Use Agreement will increase operating efficiency, will reduce operating costs and will maintain the level of competition that shippers currently have access to (see Application, p. 1). The D&H states that traffic volumes have been too low to support more than two round trips per week between Albany and New York City (V.S. Craig at 3.) The D&H anticipates that the Joint Use Agreement “will significantly enhance D&H’s competitiveness in the Albany - New York City corridor” (V.S. Craig at 5.) because it will reduce D&H’s operating costs, while at the same time increase its service frequency from twice per week to between five and seven days per week.

NYSDOT acknowledges that the institution of haulage service proposed provides an opportunity for enhanced competition in the corridor and is consistent with the Board’s decision in *Conrail*² granting Canadian Pacific Railway (of whom D&H is a wholly owned subsidiary) access to the “East-of-Hudson” market. However, the proof will be in D&H’s performance and its ability to grow its market share as a result of the efficiencies and cost savings claimed in the application.

Albany – Rouses Point Segment

NYSDOT has a long history of public capital investment in the D&H’s main line between Albany and Rouses Point. NYSDOT has also subsidized intercity passenger rail operations in this corridor, known as Amtrak’s Adirondack Service, since 1974³. This route is viewed as a critical link between New York City and Montreal, the largest metropolitan area in the United States and the second-largest in Canada. NYSDOT’s investments have supported both freight and intercity passenger rail operations in the corridor. With respect to intercity passenger rail

² “...we are requiring CSX to negotiate an agreement with CP to grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens)...” (Citations omitted, *Conrail* at 3 S.T.B. 214)

³ The State of Vermont also subsidizes Amtrak’s Ethan Allen service, which operates in the corridor between Schenectady, NY and Whitehall, NY.

investments, NYSDOT has prioritized investments that have improved on-time performance and reduced trip time.

The addition of CSXT overhead traffic to this route will make more productive use of NYSDOT's prior investments in track and signal systems in the corridor. However, this additional traffic has the potential to impact Amtrak service in the corridor. The applicants' letter to the Board, dated May 11, 2010, provides assurances that "the proposed transaction will not affect adversely Amtrak's operations over D&H's lines." These assurances are not supported by any exhibits or verified statements contained in the record, and, in fact, are contradicted by the Operating Plan presented in the Application (see Exhibit 15) and Amtrak's public timetables⁴.

According to the operating plan presented, northbound trains carrying Joint Use traffic will depart D&H's Saratoga Yard and arrive at Rouses Point in late afternoon, while southbound trains will depart the Montreal terminal in the morning and arrive at Saratoga Yard in late evening. On its current schedule (dated June 21, 2010), Amtrak's northbound Adirondack departs Saratoga Springs at 11:57 a.m. and arrives at Rouses Point at 4:00 p.m.; Amtrak's southbound Adirondack arrives at Rouses Point at 11:05 a.m., dwells on the single-track main line at Rouses Point until 12:05 p.m. for U.S. Customs and Border Patrol inspections and arrives at Saratoga Springs at 3:53 p.m. At minimum, both Amtrak trains will need to meet opposing D&H trains carrying Joint Use traffic within the Saratoga – Rouses Point Segment.

The need to meet and pass opposing trains on what is largely a single-track railroad on a daily basis introduces opportunities for delays that could potentially offset the improvements in on-time performance funded by NYSDOT.

On January 28, 2010, NYSDOT received an award under the Federal Railroad Administration's ("FRA") High-Speed Intercity Passenger Rail Program, funded by the American

⁴ Available at <http://www.amtrak.com/servlet/ContentServer/Page/1237405732505/1237405732505>

Recovery and Reinvestment Act of 2009 (Pub.L. 111-5), for construction of three miles of second main track on D&H's Canadian Subdivision, immediately south of Saratoga Yard⁵. On May 12, 2010, the FRA released guidance on content of "stakeholder agreements," defined as those agreements between the State grantees (in this case, NYSDOT), railroad owners (here, D&H) and intercity passenger rail operators (here, Amtrak) necessary for the design, construction and operation of the project. With respect to capacity improvement projects such as this project, the FRA's guidance states:

Where FRA is making a significant investment that will result in additional capacity beyond what is required for the scheduled IPR service that will operate immediately following completion of the project, FRA expects that the Agreement will recognize this investment and reserve the Grantee's right to such capacity for future IPR service.

Independent of this proceeding, NYSDOT is negotiating the terms of the stakeholder agreement for this project with D&H. However, approval of this transaction must not adversely affect the capacity for future intercity passenger service resulting from this project.

Albany – Syracuse Segment

The elimination of one daily round trip between Selkirk, N.Y., and Syracuse, N.Y., on CSX's busiest main line in the state is not expected to have any effect on transportation services available to shippers, intra- or inter-modal competition or Amtrak services in the corridor.

Syracuse – Fort Covington Segment

Unlike the other track segments affected by this transaction, on the Syracuse – Fort Covington Segment the State has significant concerns regarding the effects of the transaction in this corridor. The re-route of Canadian National (CN) interchange traffic to the Albany – Rouses

⁵ See <http://www.fra.dot.gov/Downloads/PubAffairs/dot18-10.pdf> for the FRA press release and https://www.nysdot.gov/recovery/repository/NY_A-02_FRA_application.pdf for NYSDOT's application materials describing the project.

Point Segment will adversely affect CSX's short-line connections, shippers and employees on Syracuse – Fort Covington Segment.

Where CSXT currently enjoys the economies of density in the Syracuse – Fort Covington Segment by combining its local and overhead traffic in the corridor, following the transaction CSXT will be deprived of the economies of density, rendering its service less competitive with the primary shipping alternative in the corridor, trucks. Currently, 51 percent of the traffic in the corridor is overhead traffic for interchange with CN (Application at 2) and local freight in the corridor handled on a daily basis on the same train that handles the CN overhead traffic. Following the transaction, service will be reduced to two to three days per week (Application at 18-19) and local shippers (served by either CSXT directly or their short-line connections in the corridor⁶) will need to carry the full cost of the Syracuse – Fort Covington Segment, with no financial contribution from overhead traffic. Using the figures presented on Page 2 of the Application, upon approval of the transaction the Syracuse – Fort Covington Segment would see approximately 17,150 car loads (49 percent of the 35,000 carloads in 2009) over the 214 miles between Syracuse and Huntingdon, PQ. This works out to only 80 car loads per mile per year. At these reduced volumes, long-term outcomes for this corridor may include reduced capital investment that frequently leads to lower train speeds, increased travel time and poorer service.

These effects are exactly the opposite of the effects of the transaction anticipated in the Albany – Fresh Pond Segment and have the potential to make rail transportation less competitive vis-à-vis trucks.

In addition, the effects of this transaction on railroad employees will be most acute in the Syracuse – Fort Covington Segment, where 14 jobs will be abolished to only four jobs created. Three of the five counties traversed by the Syracuse – Fort Covington Segment

⁶ Within the Syracuse – Fort Covington Segment, CSX provides the only point of interchange for the Mohawk Adirondack & Northern Railroad Corp. at Carthage, NY; the New York & Ogdensburg Railway Co. at Norwood, NY; and the Massena Terminal Railroad at Massena, NY

(Oswego, St. Lawrence and Franklin) have been designated as Economically Distressed Areas under the American Recovery and Reinvestment Act of 2009 (ARRA)⁷.

CONCLUSION AND REQUEST FOR CONDITIONS

The Board's analysis in this proceeding is governed by 49 U.S.C. § 11324(d) that states the Board must approve the transaction unless it finds both that: (1) the transaction is likely to result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

The applicants have demonstrated that there are environmental benefits associated with the transaction through reduced fuel consumption and fewer ton-miles traveled with the State. The applicants have also made commitments that the transaction will enhance competition, improve efficiency, lower costs for shippers (Application at 13) and have no adverse impact on Amtrak services (May 11, 2010, letter from Applicants to the Board) on the Joint Use Lines.

At the same time, NYSDOT has identified the potential for adverse effects on shippers located on the Syracuse – Fort Covington Segment due to increased costs and less-frequent service and the potential for impacts to Amtrak services, while the applicants have identified impacts to the carriers' own employees.

When taken as a whole, NYSDOT finds the positive aspects of this transaction outweigh the potential negative aspects and neither of the conditions necessary to preclude approval of

⁷ ARRA adopts the definition of an Economically Distressed Area from Section 301 of the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3161) as a county where either (1) the unemployment rate average over the 24 month period is 1% or more above the national average; or (2) the per capita or personal income is 80% or less of the national average.

the transaction under Section 11324(d) are present. However, NYSDOT requests the Board to take action to increase the positive impact of the transaction on the public interest and to minimize the potential for adverse effects on shippers, intercity passengers and railroad employees.

Under 49 U.S.C. 11324(c), the Board has broad authority to impose conditions on a transaction subject to Section 11324(d) to ameliorate competitive harm that would result from the transaction. *See Kansas City Southern – Control – The Kansas City Southern Railway Company, et al., STB Finance Docket No. 34324 slip op. at 16 (STB served Nov. 29, 2004) (KCS – TexMex)*. NYSDOT recommends that approval of the application by the Board be conditioned as follows:

1. The Board should retain jurisdiction over this transaction and establish oversight of the applicants' adherence to the various representations they have made during the course of this proceeding for a period of three years, with specific attention to: (1) effects on Amtrak services in the Albany – Rouses Point corridor; (2) level of service and rates for shippers (including those served by short line connections) in both the Albany – Fresh Pond Segment and the Syracuse – Fort Covington Segment.
2. The Board should impose employee protective conditions set forth in *Norfolk and Western Ry. Co. – Trackage Rights – BN*, 354 I.C.C. 605 (1978) ("*N&W*"), as modified in *Mendocino Coast Ry., Inc. – Lease and Operate*, 360 I.C.C. 653 (1980) ("*Mendocino*")

Respectfully Submitted,



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Dated: July 2, 2010